

## PRESENTING AND DEFENDING ADMINISTRATIVE RECORDS

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- I. If agency action is reviewed under the Clean Air Act (CAA) 42 U.S.C. 7401 et. Review is based under the Administrative Procedure Act (APA), 5 U.S.C. 702 & 706, primarily Section 706 (2) (A), (C), & (D).
  - A. Review is deferential, that is, agency action will be upheld unless it is arbitrary, capricious, or contrary to law.
  - B. Agency decisions taken under other environmental laws, such as section 4(f) of the Department of Transportation Act, 49 U.S.C. 303 (and 23 U.S.C. 138), or Section 7 of the Endangered Species Act, 16 U.S.C. 1536, with substantive review standards, as well as merely informational ones (such as the National Environmental Policy Act (NEPA)) 42 U.S.C. 4321 et seq., are reviewed in accordance with APA principles.
- II. The documentary vehicle for APA review is the administrative record.
  - A. The administrative record is the written record supporting the agency's decisions. This record must show that:
    1. Agency decisionmakers understood the legal standard applying to the decision.
    2. They applied it properly, i.e., that they considered the proper information, evaluated all of the factors requiring evaluation, and considered relevant factors in terms of the legal requirements governing the action.
    3. The action taken is reasonable in terms of the above.
  - B. The administrative record is essentially the agency's file, as it relates to action at issue.
    1. Normally, this entire file is submitted to the court, and the legal positions taken by the government are then based on this written record.

- a. The record may be supplemented by explanatory testimony and additional documentation which was not directly used by the agency, but was used to prepare documentation used by the agency (such as research studies backing up a document submitted by a grant or permit applicant).
  - b. Often, even internal memoranda, notes, minutes of meetings, and other information showing the deliberative process at work and the factors considered are useful to include.
  - c. Documents disagreeing with action taken should NOT be excluded, as they tend to show the openness and fairness of the agency's decisionmaking process.
2. Sometimes, only the key documents or documents actually reviewed by the decisionmaker are submitted and designated as the administrative record.
- a. This practice has the advantage of simplifying the reviewing court's task as it reduces the volume of material to be considered.
  - b. The practice has several disadvantages, including:
    - i. The court is given an incomplete picture of events.
    - ii. There may be severe disagreements with opposing counsel as to what is "key." These disputes consume efforts better spent on substantive issues.
    - iii. There is no need to so limit the description of what the agency considered, as decisionmakers are entitled to rely on the efforts of their subordinates.
    - iv. If the issues change in focus during the proceeding, the record has to be supplemented, which may be embarrassing and confuse the presentation of issues.

C. A good administrative record should reflect what the agency did and why it acted.

1. All too often, factors considered are poorly described or omitted. No documentation explaining the basis for a particular action can be found.
2. The bases for decisions are not set forth, thus the court is left to draw its conclusions as to how the decisionmakers viewed the information in the record.
3. The record must reflect how the agency handled the information it received and developed. It must also reflect the way it handled negative information or information which tended against the action taken.
4. The record will be judged in terms of the law which applies to action. Thus, if a law, such as the CAA, requires the consideration of specific factors in determining conformity, then the record must reflect that all such factors were considered. Failure to consider even one of such factors can be fatal.

III. How the rules regarding review of administrative records should affect agency action.

A. For complex actions, the record can be extremely long and inaccessible, in terms of being easily understood for an outsider. In addition, mistakes, omissions, uncertainties, and contradictions are almost inevitable.

B. This should be kept in mind when documentation for controversial projects is being prepared.

1. Record should reflect sincere desire to comply with applicable legal requirements.
2. Record should reflect an effort to act in a manner consistent with applicable requirements. For example, if law demands consideration of public input, public comments should not be summarily disposed of in a manner suggesting arrogant indifference to the comment.

3. Record should reflect the essential good will of the agency and its attempt to weigh conflicting duties (such as building a public works project and mitigating or avoiding environmental harm).
  4. This approach often results in a court being more favorably inclined to the agency, and being more likely to dismiss as insubstantial the inevitable mistake or omission.
- C. It is important that the views of the opponents to an action, or the comments of those raising substantive concerns or objections, are fully addressed. This is especially true when the commenting entity is another Federal agency with jurisdiction or expertise in the subject matter area of the comment.
1. The comment should be fairly characterized in the consideration of the action.
  2. If possible, the concern should be resolved in a manner ultimately satisfactory to the commenting agency (i.e., the objection is withdrawn or no longer pursued).
  3. If resolution is not possible, then the reason for acting in spite of the concern should be fully explained and the record should reflect the efforts made at resolution. The record should also reflect those measures being taken, if any, because the comment, even if these only partially satisfy the concerns of the objecting agency.
- C. Remember that the administrative record is the primary way in which an agency can present its factual case to a court.
- IV. Matters to consider in the presenting the administrative record in court.
- A. The administrative record should be made as easy to understand as possible.
1. If it is very complex, it might be accompanied by an explanatory affidavit or statement which explains how various documents fit in the process. This role might also be filled by the pretrial, post-trial, or motion brief.

2. Complex or highly technical decisions should be explained in decision documents which are understandable to a layman.

- a. Excessive reliance on an implicit understanding of technical principles and standards should be avoided.
- b. Decision documents (such as conformity determinations or a Record of Decision following an environmental impact statement) should be internally understandable, rather than merely referencing documents in the record to a point where the decision document cannot be read alone. Of course, it is appropriate to reference other documents relied upon, especially those which are long or require a high degree of technical sophistication to read.
- c. Decision documents or technically accessible documents are most effective and most easily used if they are prepared during or as part of the deliberative process, rather after a lawsuit is filed.

- B. Make sure that the administrative record is organized in an accessible fashion, i.e., that it is properly indexed, documents are clearly marked, pleadings cross-reference the record accurately, etc.
- C. Point the reviewer (court) to the most important documents.
- D. Key witnesses should know what is in the record regarding their portion of the action. It is probably a good idea to be assisted at trial by a technical person who is familiar with the entire record, and whose task it is to monitor the proceedings in terms of the documents in the record.

#### IV. Controversial and noncontroversial projects.

- A. 1. The proper documentation of agency action is required whether or not a matter is examined by a court.

2. The above approach towards preparing records is appropriate for very important actions or actions where a court review is likely. However, most actions are not so important in the larger scheme of things and few see the courtroom. For example, the Federal Highway Administration (FHWA) takes 12,000 to 14,000 actions per year. Of these, about 60 require an environmental impact statement. On average, about 18 to 20 new NEPA lawsuits are filed against FHWA each year.
  3. Clearly, a full scale effort on each action is impossible. However, how much is enough?
- B. For the very smallest actions, such as a determination that a project is among those exempt from conformity, minimal documentation is all that can and should be required. If these are challenged, some post hoc explanation may be inevitable, and, given that very little litigation involves small actions, not very risky.
  - C. For the noncontroversial or only moderately sized action, the record should reflect compliance with applicable legal requirements, but a full scale explanation of each decision and preparation of self-sufficient decision documents is not advisable.
  - D. Keep in mind that much of what is discussed here is not so much meeting statutory requirements, but making sure that the record understandably reflects how those requirements were met. Absolute clarity is not quite so important if the action at issue is never challenged.

#### V. Conclusion

- A. Failure to have an adequate administrative record is almost always fatal to a major APA proceeding.
- B. There are ways to rescue a defense if the record is lacking, but these are expensive, time consuming, and risky, in that typically they expose the agency decisionmaking process to far closer and more wary examination than would be the case with an adequate record. Rescue techniques include:
  1. Use of testimony by decisionmakers and others who participated in the process.
  2. Production of after the fact explanations of actions taken.

3. Use of expert testimony and other evidence not part of the record (i.e., not considered by the decisionmaker) to underscore the correctness of the agency's action.
  4. These approaches are often troublesome because they raise severe credibility problems for the agency. Post hoc rationalizations are inherently suspect.
- C. Where the record is plainly defective, one should consider a voluntary remand to the agency for a new decision after the preparation of a proper record. In this case, the action must be delayed while the new decision is being made. This is essentially giving up, which may sometimes be the best way out.
- D. Time spent at preparation of a good record is usually the best way to spend time at the beginning of a lawsuit. Even better, when a lawsuit seems inevitable or highly likely is to prepare AND KEEP records in a way that makes it easy to convert the project file into an administrative record which can be presented in court.